

1 VALERIA CALAFIORE HEALY (*phv*)
2 valeria.healy@healylex.com

3 HEALY LLC
154 Grand Street
New York, New York 10013
Telephone: (212) 810-0377
4 Facsimile: (212) 810-7036

5 DANIEL J. WEINBERG (SBN 227159)
6 dweinberg@fawlaw.com

7 FREITAS ANGELL & WEINBERG LLP
350 Marine Parkway, Suite 200
Redwood Shores, California 94065
Telephone: (650) 593-6300
8 Facsimile: (650) 593-6301

9 Attorneys for Plaintiff
10 LOOP AI LABS INC.

11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13
14 LOOP AI LABS INC.,

15 Plaintiff,

16
17 v.

18 ANNA GATTI, et al,

19 Defendants.
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CASE NO.: 3:15-cv-00798-HSG-(DMR)

**PLAINTIFF LOOP AI LABS INC.'S
REPLY IN FURTHER SUPPORT OF
ITS MOTION TO DISQUALIFY
FORMER ORRICK ATTORNEY
STERNBERG AND HIS
NEW FIRM VENABLE LLP**

Date: November 5, 2015

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Trial Date: July 11, 2016

Hon. Haywood S. Gilliam, Jr.

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INTRODUCTION¹

In its Opposition, Almawave cites no case in which disqualification was denied on facts such as those presented here.² This is unsurprising, because no such case exists. While at Orrick, in March 2014, Sternberg undertook to represent Almawave and Anna Gatti (“the Almawave-Gatti representation”) in a manner that was directly adverse to Orrick’s client, Loop AI. This conflicted representation continued for almost a year. Almawave’s unsupported claim that the Almawave-Gatti representation did not become “adverse” to Loop AI until this action was filed is patently false. For one thing, Sternberg/Orrick caused the implementation of agreements between Almawave and Gatti, as well as IQSystem (of which Gatti was the sole owner)³ — which required Gatti to breach fiduciary and contractual obligations to Loop AI that were set forth in agreements also prepared by Orrick. By this conduct, Sternberg/Orrick breached the fiduciary duties they owed to Loop AI.

Almawave does not dispute that, had Sternberg remained at Orrick, he would have been automatically disqualified. Instead, Almawave claims in conclusory fashion that, because he has now moved his adverse representation to Venable, Loop AI is no longer entitled to the protection afforded by the conflicts of interest rules, and has no recourse for the continuing prejudice caused by Sternberg’s conflicted representation. Courts do not so easily allow attorneys to circumvent their ethical obligations to a client, and both case law and public policy require rejection of Almawave’s unfounded position.

Almawave asks this Court to apply a body of law whose test Almawave distorts completely and which is inapplicable to the facts here. The standard that Almawave invokes throughout its Opposition — to which it refers at times as the double-imputation standard, and

¹ In this Reply, Loop AI adopts the same definitions used in its DQ Motion. In addition, Loop AI refers to Sternberg’s and Orrick’s representation of Almawave that began in March or April 2014 as the “Almawave-Gatti representation.”

² See Almawave USA Inc.’s Opposition to DQ Motion (“Opp.”) at Dkt. 278.

³ Sternberg knew or should have known that Gatti was sole owner of IQSystem. A simple search of public records, which most conflict checks require when a company is not publicly owned, would have immediately revealed that information since Gatti was officially listed as the sole member of IQSystem and the company was listed as being based in the apartment where she lived at the time Orrick’s conflict check was run.

1 other times as the modified substantial relationship standard — does not apply to an attorney, as
 2 Sternberg here, who is personally involved in a conflicted representation at one firm, and who
 3 then moves his conflicted representation to a new firm, from where he continues to work on, and
 4 in fact be in charge of, the conflicted representation. The standard invoked by Almawave applies
 5 only to situations where the target attorney had no involvement in any aspect of the former
 6 conflicted engagement, and simply happens to find himself in a new firm who has a client that is
 7 in conflict with a second client of the firm with which the attorney was formerly affiliated,
 8 ***through no fault of or involvement by the attorney***; and where appropriately effective
 9 prophylactic measures are taken at the new firm to prevent any taint by the attorney of his new
 10 firm. That paradigm is entirely absent here. The paradigm would have been applicable if
 11 Sternberg (i) while at Orrick, had no involvement in the conflicted Almawave-Gatti
 12 representation or, perhaps, was effectively screened with Loop AI's consent from contact with
 13 Orrick's attorneys working for Loop AI, (ii) had no contact with Loop AI's executive officer
 14 (Gatti), directly and through the team he supervised, or with anyone else at Orrick that could
 15 result in his receipt of Loop AI's confidential information, and (iii) had no involvement while at
 16 Venable in the current litigation and instead was behind an ethical screen imposed between
 17 Sternberg and the Venable litigation team from the outset. If those were the facts, (and
 18 Almawave concedes they are not), the situation here would be different. But Sternberg is not the
 19 victim of an accidental conflict featured in the cases cited in Almawave's Opposition. Far from
 20 it. Sternberg ***did*** actively participate in the conflicted representation while at Orrick, ***did*** have
 21 access while at Orrick to Loop AI's confidential information, including through Gatti and the
 22 overlapping Orrick teams participating in both representations, ***was not*** walled off when he
 23 arrived at Venable, and failed to take ***any*** action to prevent or mitigate the conflict he caused. As
 24 a result, the body of law examined confusingly in the Opposition is simply irrelevant to the
 25 present situation.

26 In its DQ Motion Loop AI explained that disqualification is required by two separate and
 27 independent conflicts of interest. ***First***, disqualification is required as a result of Sternberg's
 28 ***client conflict***. Client conflicts are examined by courts under different tests depending on the

1 facts. Loop AI established in its DQ Motion that the client conflict at issue here should be
 2 examined in accordance with the **current client** test, applicable to conflicts that **first arise** where,
 3 as here, there was a simultaneous adverse representation of two current clients. Sternberg's
 4 conflicted representation began in March 2014, while he was at Orrick, and continued unabated
 5 into 2015, when he moved to Venable. The applicable case law does not allow lawyers to evade
 6 the nearly automatic disqualification rule utilized when they act adversely to current clients
 7 simply by changing firms; to avoid this unseemly result, courts apply the current client test **as of**
 8 **the time the conflict first arose**. The Opposition cites no cases to the contrary.⁴ **Second**,
 9 independent of the client conflict, disqualification is also required as a result of Sternberg's
 10 **personal interest conflict**. That conflict arises out of Sternberg's (and now Venable's)
 11 involvement in material facts at issue in this action – most recently, Almawave USA's recent
 12 move of its putative US "office" from Gatti's home to Venable's small San Francisco office
 13 suite, where the attorneys of record in this case are based.⁵ The personal interest conflicts at
 14 issue in this case have already impeded the efficient administration of justice and will continue to
 15 do so unless disqualification is ordered.⁶

16 ARGUMENT

17 I. LEGAL FRAMEWORK

18 Despite telling the Court that "California law governs Loop's motion," Almawave
 19 neglects to cite a single California case discussing the standard for deciding disqualification
 20 motions.⁷ This is so even though in one of the cases it cites for other reasons, *People ex rel.*

22 ⁴Although Sternberg's conduct should be adjudged in accordance with the concurrent client
 23 conflict rule, as Loop AI explained in its DQ Motion, even under the test applicable to former
 clients, disqualification would still be required for several reasons.

24 ⁵See VCHealy Declaration ("VCH Decl."), at ¶ 5, Ex. 3.

25 ⁶Loop AI also explained in the DQ Motion that Sternberg's conflicts are imputable to Venable
 because Sternberg tainted the firm with his conflicts and was not screened from working on this
 case. Almawave also does not dispute that, if the Court disqualifies Sternberg, Venable's
 disqualification is also required.

26 ⁷Loop AI has noted that Sternberg is a New York lawyer: although he admits to participating as
 27 counsel for Almawave in this case, he has not filed a motion to appear *pro hac vice*. Therefore,
 28 reference to New York law and the New York RPC is appropriate, particularly if a conflict of
 laws is found to exist. In its Opposition, Almawave asks the Court to judge Sternberg's conduct

1 *Dept. of Corporations v. Speedee Oil Change Systems, Inc.*, 20 Cal. 4th 1135 (1999), the
 2 California Supreme Court made that standard clear: while “disqualification motions involve a
 3 conflict between the clients’ right to counsel of their choice and the need to maintain ethical
 4 standards of professional responsibility,” the “paramount concern must be to preserve public
 5 trust in the scrupulous administration of justice and the integrity of the bar. ***The important right***
 6 ***to counsel of one’s choice must yield to ethical considerations that affect the fundamental***
 7 ***principles of our judicial process.*”** *Id.* at 1145–1146. (Emphasis added)

8
 9 Almawave’s claim that disqualification is a measure which courts should “hesitate to
 10 impose,” is particularly difficult to square with the fact that one of the grounds on which Loop
 11 seeks disqualification is the concurrent client conflict which arose when Sternberg, while at
 12 Orrick, began acting adversely to Loop AI’s interests on Almawave’s behalf. As the Central
 13 District of California recently pointed out,

14
 15 The default rule for a concurrent conflict in California is automatic
 16 disqualification in all but a small number of cases. *See Blue Water Sunset, LLC v.*
 17 *Markowitz*, 192 Cal. App. 4th 477, 486-87 (2011) (“If an attorney simultaneously
 18 represents two clients with adverse interests, automatic disqualification is the rule
 19 in all but a few instances.”). The disqualification rule in the case of a concurrent
 20 conflict is strict and requires disqualification in nearly every case. *See People ex*
 21 *rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.*, 20 Cal. 4th
 22 1135, 1147, 86 Cal. Rptr. 2d 816, 980 P.2d 371 (1999) (noting that when a lawyer
 23 represents “clients whose interests are directly adverse in the same litigation...the
 24 rule of automatic disqualification applies”); *Flatt v. Superior Court*, 9 Cal. 4th
 25 275, 282-85, 36 Cal. Rptr. 2d 537, 885 P.2d 950 (1994) (“Indeed, in all but a few
 26 instances, the rule of disqualification in simultaneous representation cases is a per
 27 se or ‘automatic’ one.”)

28
 by application of a “modified substantial relationship test” which is not recognized under New
 York law. *See, e.g., Cardinale v. Golinello*, 43 N.Y.2d 288 (1977) (disqualifying counsel under
 circumstances virtually identical, albeit less egregious, to the present situation). Although, Loop
 AI believes that disqualification would be required even under that test, to the extent the Court
 believes application of that test qualifies Sternberg and Venable to act as counsel adverse to
 Loop AI in this matter, Loop AI respectfully seeks leave to submit supplemental briefing on this
 issue.

1 *White v. Experian Info. Solutions*, No. 05-01070, 2014 U.S. Dist. LEXIS 61433, at *17-18 (C.D.
 2 Cal. May 1, 2014). Disqualification is automatic in cases where, as here, counsel has run afoul
 3 of the concurrent client conflict rule. But California courts – and federal courts sitting in
 4 California – have frequently disqualified counsel in situations where violations of other ethical
 5 rules have been found, and even in cases where no specific rule violation was found. *See, e.g.,*
 6 *Cal Pak Delivery, Inc. v. UPS, Inc.*, 52 Cal. App. 4th 1, 11 (1997).

7 **II. DISQUALIFICATION BASED ON THE CLIENT CONFLICT IS APPROPRIATE.**

8 In its DQ Motion, Loop AI drew the Court’s attention to the client conflict that warrants
 9 disqualifying Sternberg/Venable from acting adversely to Loop AI in this litigation.
 10 Specifically, the Orrick firm – having undertaken to represent Loop AI with respect to virtually
 11 all of its legal matters, including its employment agreement with its then-CEO and later
 12 President Anna Gatti – subsequently began to act adversely to Loop AI’s interests, on behalf of
 13 Almaxwave, with respect to many of the very same matters, without Loop AI’s knowledge or
 14 consent. When Loop AI discovered that Orrick had engaged in representation adverse to Loop
 15 AI’s interests (including by preparing an Employment Agreement for Almaxwave that required
 16 Gatti to breach her Employment Agreement with Loop AI), Orrick did not immediately desist
 17 from acting adversely to Loop AI – instead, it dropped Loop AI like a hot potato. Only weeks
 18 before it did this, Sternberg – the partner in charge of the Orrick team representing Almaxwave
 19 adversely to Loop AI – jumped Orrick’s ship and proceeded to carry on his conflicted
 20 representation at a different firm, Venable.

21 Most attorneys would immediately recognize the conflict problem Sternberg and his new
 22 firm had created; but, if Almaxwave’s Opposition is to be believed, Almaxwave does not.
 23 Although its Opposition is opaque in parts, and relies on a number of “red herring” defenses
 24 (such as the erroneous claim that Loop AI is seeking to disqualify Sternberg and his new firm
 25 under a “double imputation” theory),⁸ it appears that the gist of Almaxwave’s defense can be
 26

27 ⁸ Concerns about “double imputation” arise when client A’s confidences are imputed to a target
 28 lawyer at Firm X (even though the target lawyer never had contact with client A), and then

1 boiled down to three contentions: (1) Orrick had no conflict while Sternberg was still a partner
 2 there because Almawave and Loop were not then “legally” adverse [Opp. at 1:27]; (2) even if
 3 Orrick was conflicted while Sternberg was an Orrick partner, Sternberg had no problem because
 4 he personally “never represented Loop” [Opp. at 1:28]; (3) and, even if Sternberg could not have
 5 ethically continued to represent Almawave had he stayed at Orrick, he cured the conflict by
 6 moving to Venable, thereby converting Loop to a “former” client. None of these arguments
 7 survive scrutiny.

8 **A. Sternberg Undertook Representation That Was Directly Adverse To Loop**
 9 **AI.**

10 Almawave’s first line of defense is premised on its baffling claim that “[w]hile Orrick at
 11 one time did simultaneously represent Loop and Almawave,” there was no conflict then because
 12 Loop AI and Almawave were “not adverse at the time.” Opp. at 15:12-15. This is both factually
 13 and legally wrong. In connection with the Almawave-Gatti representation, Sternberg, while an
 14 Orrick partner, directly participated in negotiating and implementing the Almawave-Gatti
 15 employment agreements, which on their face required Gatti, while she was the Loop AI’s CEO,
 16 to breach her fiduciary and contractual obligations to Orrick’s existing client, Loop AI, which
 17 were set forth in agreements also prepared by Orrick.⁹ For instance,

18
 19 reimputed to those attorneys at target lawyer’s new firm Y, who work for client B against client
 20 A (even though the target lawyer is not involved in new firm Y representation). In this case no
 21 concern about “double imputation” or “reimputation” arises, because there is no dispute that
 22 Sternberg himself is directly involved in (and in fact is the responsible partner) for Almawave’s
 23 representation adverse to Loop AI.

24 ⁹ See Dkt. 45 at ¶ 308; Dkt. 156 at 2:9-23:20; Dkt. 210 at ¶¶ 1, 377; VCH Decl., Ex. 1
 25 (Employment agreement between Gatti and Loop AI); VCH Decl., Ex. 2 (Employment
 26 agreement between Gatti and Almawave USA). While Sternberg claims in his Declaration that
 27 he did not participate in the negotiation of the Almawave-Gatti employment agreement, that self-
 28 serving statement is not proof that that is so. Loop AI has repeatedly tried to obtain discovery
 over Sternberg and Orrick’s involvement, but all forms of discovery were objected-to, and
 Almawave (as well as Orrick and Venable) have refused to even provide a privilege log. See
 VCH Decl. at ¶ 9; Dkt. 257-1, 124-2, 9-2, 278-1. Clearly, if Sternberg was not involved in any
 communications or negotiations, as he now claims, there would have been no reason to make
 such objections and there would have been nothing to list on the privilege log that Almawave has
 refused to provide. Further, Loop AI has provided evidence showing that Sternberg, or someone
 else at Orrick at his direction, was working on the agreement as of April 17, 2014, but that the
 agreement allegedly did not get signed until June 6, 2014. See e.g. Dkt. 199 at 14; 199-6 at

- 1 • Gatti's employment agreement with Loop AI did not permit her to have another job, let
2 alone a second concurrent job as the part-time CEO of a competitor, or to engage in
3 other business activities without Loop AI's written consent. *See* Dkt. 210 at ¶ 93, VCH
4 Decl., Ex. 1 at § 2. Directly contrary to these requirements, Sternberg, while an Orrick
5 partner, assisted Almaxwave in implementing an employment agreement with Gatti that
6 required Gatti to work as Almaxwave's part-time CEO. *See* Dkt. 199-6 at ECF p. 12
7 (stating Orrick was working on Alma-Gatti agreement), and VCH Decl., Ex. 2.
- 8 • Under her employment agreement with Loop AI, Gatti was not permitted to participate
9 in technology development for other companies or share Loop AI's confidential
10 information or trade secrets with anyone else outside of Loop AI or without Loop AI's
11 consent. In addition, Gatti assigned to Loop AI any "right, title and interest throughout
12 the world in and to any and all Company Inventions and all patent, copyright,
13 trademark, trade secret and other intellectual property rights therein." VCH Decl., Ex.
14 1 at § 4(d). Directly contrary to these requirements, Sternberg, while an Orrick partner,
15 assisted Almaxwave in implementing an employment agreement with Gatti that required
16 Gatti to assign *to Almaxwave* any "right, title and interest throughout the world in and to
17 any and all Company Inventions and all patent, copyright, trademark, trade secret and
18 other intellectual property rights therein." VCH Decl., Ex. 2 at § 4(d).
- 19 • Sternberg directed a paralegal in Orrick's San Francisco office to incorporate
20 Almaxwave's new subsidiary in Gatti's home, also in breach of her fiduciary and
21 contractual duties set forth in her employment agreement with Loop AI.
- 22 • For almost one year, Sternberg and a team of other Orrick attorneys acting at his
23 direction, including three who worked on the Loop AI matter, continued to assist Gatti
24 as the new CEO of Almaxwave in conduct that continued to violate her fiduciary and
25 contractual obligations to Loop AI.

26 There can be little question that the Almaxwave-Gatti representation that Sternberg took on
27 and continued for almost one year while at Orrick was adverse to Loop AI, and was not
28 permissible without Loop AI's knowledge and consent. The "adversity" requirement in Rule 3-
310(C) of the California Rules of Professional Conduct, which bars the concurrent "adverse"
representation of the interests of two clients, does not depend on the filing of litigation, as
Almaxwave contends.¹⁰ The ABA and NY Rules are to the same effect.¹¹ The California

RRA-221. Unless there was negotiaton over the terms of the agreement, the long gap of time
cannot be explained.

¹⁰ Cal. Rules of Prof'l Conduct R. 3-310(C). Official Comment dated 1992 ("Subparagraph
(C)(3) is intended to apply to representations of clients in both litigation and transactional
matters.").

¹¹ ABA Model Rules of Prof'l Conduct R. 1.7; N.Y. Rules of Prof'l Conduct R. 1.7.

Supreme Court has construed the term “adverse” in the context of the California Rules of Professional Conduct as consistent with the following dictionary definition: “acting against or in contrary direction ... hostile, opposed, antagonistic.... 2a: in opposition to one’s interests: detrimental, unfavorable.... 3:... 4 law: having opposing interests: having interests for preservation of which opposition is essential.” *Ames v. State Bar of California*, 8 Cal. 3d 910, 917 (1973).¹² The Almawave-Gatti representation that Sternberg undertook while an Orrick partner was unquestionably “adverse” to Orrick’s client, Loop AI. Sternberg’s alleged ignorance of the conflict, whether willful or not, does not excuse a violation of the Rules.¹³

B. Sternberg Owed Loop AI Fiduciary Duties, Which He Breached.

According to Almawave, “Loop must prove the existence of an attorney-client relationship between Sternberg and Loop, not just Orrick and Loop” [Opp. at 6, 16], which Loop cannot do because Sternberg “never represented Loop.” *Id.* at 1:28. These contentions are not only conclusory and unsupported,¹⁴ but defy both basic partnership law and the principles of

¹² See also, e.g., *Moreno v. AutoZone, Inc.*, No. 05-4432, 2007 U.S. Dist. LEXIS 98250, at *12 (N.D. Cal. Dec. 5, 2007) (“a conflict of interest exists when a lawyer’s duty on behalf of one client obligates the lawyer to take action prejudicial to the interest of another client.”).

¹³ See e.g. ABA Model Rule 1.7, Comment [3]: “To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved.... ***Ignorance caused by a failure to institute such procedures will not excuse a lawyer’s violation of this Rule.***” (emphasis supplied); *California State Bar Standing Committee on Professional Responsibility and Conduct*, Formal Opinion No. 2011-182 (“attorney should check for any potential conflicts with those who are adverse and potentially adverse, including reasonably foreseeable parties and witnesses, before accepting representation of a client.[] The attorney should also refresh conflict checks upon the appearance of new parties and witnesses during the pendency of a representation.”).

¹⁴ Almawave misleadingly cites several cases, not one of which stands for the false proposition it argues. There is no case that holds that a partner in a law firm, as Sternberg was while at Orrick, has no attorney-client relationship with the clients of his firm for conflicts or other purposes. If that were the case, there would be no necessity for the often complex conflict clearance procedures that lawyers in law firms are required to comply with, and which regularly require law firms to have to turn down business even where the possibility of a conflict is just slight or speculative. If Almawave and Sternberg’s proposition had any basis, it is unclear why Sternberg even felt the need to perform a conflict check at all before taking on the Almawave-Gatti representation while at Orrick.

imputed disqualification that are in force in New York, where Sternberg is admitted to practice,¹⁵ as well as in California, and likely every other American jurisdiction.¹⁶ *See, e.g., Flatworld Interactives LLC v. Apple Inc.*, No. 12-01956, 2013 U.S. Dist. LEXIS 111496, at *21 (N.D. Cal. Aug. 7, 2013) (“As a partner at Morgan Lewis, John McAleese *owed a duty to his firm’s client regardless of whether or not he personally worked on that client’s matters*. Just as a Morgan Lewis attorney working on Apple matters could not act adversely against Apple, so too was John McAleese barred from doing so, whether in a legal capacity or not. *He owed a duty of loyalty to his firm’s client, and ‘it is a violation of that duty for him to assume a position adverse or antagonistic to [that] client without the latter’s free and intelligent consent’*”, quoting *Flatt v. Superior Court of Sonoma Cnty.*, 9 Cal. 4th 275, 289 (1994) (emphasis supplied)). Sternberg — as an Orrick Partner — owed Orrick’s client, Loop AI, fiduciary duties.¹⁷ While he continued to be an Orrick partner, Sternberg’s fiduciary duties to Loop AI prohibited him from acting adversely to Loop AI, an Orrick client, *on any matter*.¹⁸ By taking on and causing Orrick to take on the conflicting Almaxwave-Gatti representation in March 2014, and by continuing that representation for almost one year without disclosure to (let alone consent from) Loop AI, Sternberg unquestionably breached his fiduciary duties to Loop AI.¹⁹

C. Sternberg’s Duties To Loop AI Did Not End When He Left Orrick.

¹⁵ *See, e.g.,* N.Y. Rules of Prof’l Conduct R. 1.10(a) (2015) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein”).

¹⁶ *Flatt v. Superior Court*, 9 Cal. 4th 275, 286 (1994) (citing authorities from NY and Conn.).

¹⁷ *See, e.g., Flatworld Interactives*, 2013 U.S. Dist. LEXIS 111496, at *21 (N.D. Cal. Aug. 7, 2013); *Advanced Messaging Techs., Inc. v. Easylink Servs. Int’l Corp.*, 913 F. Supp. 2d 900 (C.D. Cal. Dec. 19, 2012); ABA Model Rules of Prof’l Conduct R. 1.10; N.Y. Rules of Prof’l Conduct R. 1.10(a) (2015).

¹⁸ *Flatt*, 885 P.2d at 955-956; *People ex. rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.*, 20 Cal. 4th 1135, 1146 (1999); Cal. Rules of Prof’l Conduct R. 3-310(C); ABA Model Rules of Prof’l Conduct R. 1.7; N.Y. Rules of Prof’l Conduct R. 1.7.

¹⁹ *See, e.g., Flatworld Interactives*, 2013 U.S. Dist. LEXIS 111496, at *21.

1 Almawave argues that, even if Sternberg owed Loop AI a duty of loyalty while he still
 2 worked at Orrick, once he left Orrick that duty disappeared; and, because it did, Sternberg's
 3 conduct should not be judged by the "automatic" disqualification test which courts utilize when,
 4 as here, a lawyer has acted in a manner that is contrary to the interests of a current firm client;
 5 but, rather, the court should decide whether to disqualify Sternberg in accordance with a
 6 modified version of the "substantial relationship" test that is used when a lawyer acts adversely
 7 to the interests of a former client.

8 The California Supreme Court has made it clear that the duty of loyalty cannot be so easily
 9 escaped: "[s]o inviolate is the duty of loyalty to an existing client that not even by withdrawing
 10 from the relationship can an attorney evade it." *Flatt*, supra at 288. Other courts have remarked,
 11 in different circumstances, upon a lawyer's inability to cure a conflict by converting a current
 12 client into a former one. *See, e.g., In re Cal. Growers and Cannerys*, 74 B.R. 336, 344 (Bankr.
 13 N.D. Cal. 1987) (stating that, when a lawyer voluntarily resigns because of a conflict, the
 14 termination must be disregarded). For this reason, courts decide whether disqualification should
 15 be ordered in accordance with the current or former client conflict test by evaluating whether the
 16 moving party was a current or former client at ***the time the conflict first arose***.²⁰ Almawave cites
 17 no authority to contradict these principles. Simply stated, Almawave has failed to explain why
 18 Sternberg's conduct should be judged under the more lenient former client conflict rule even
 19 20 21

22 ²⁰ The per se rule of disqualification "applies if an attorney simultaneously represents clients
 23 with differing interests even though the representation ceases prior to filing the disqualification
 24 motion." *Ehrich v. Binghamton City Sch. Dist.*, 210 F.R.D. 17, 25 (N.D.N.Y. 2002) (citing
 25 *Unified Sewerage Agency of Washington Co., Ore. v. Jelco*, 646 F.2d 1339, 1345 n. 4 (9th Cir.
 26 1981)). *See also Truck Ins. Exch. v. Fireman's Fund Ins. Co.*, 6 Cal. App. 4th 1050, 1057 (Cal.
 27 App. 1992). "The critical event is when the conflict arose, not when the motion was brought."
 28 *Ehrich*, 210 F.R.D. at 25. In *Ehrich*, the court found that while an attorney had last represented
 the moving client 7-months earlier, "the facts generating the lawsuit and the conflict arose during
 [the attorney's] employment." *Id.* *See also, e.g., El Camino Res., LTD. v. Huntington Nat'l*
Bank, 623 F. Supp. 2d 863, 877-878 (W.D. Mich. 2007) ("the status of the attorney/client
 relationship is assessed at the time the conflict arises, not at the time the motion to disqualify is
 presented to the court.").

though he not only acted adversely to Loop AI's interests while he was still a partner at Orrick, but also created the concurrent conflict that precipitated this motion by failing, intentionally or otherwise, to perform a proper conflict check. Sternberg's self-serving contention that he moved to Venable, right before this case was filed, for unrelated reasons does not alter the analysis, even if true. As one court has observed, "[t]his ethical rule is not triggered only when the attorney's motives are selfish or otherwise suspect. The rule vindicates the attorney's fundamental duty of loyalty: *the breach of ethics is not triggered by bad motive or excused by good motive.*" *El Camino*, 623 F. Supp. 2d at 877-878 (emphasis supplied).²¹

Respectfully, under these facts, application of the current client test is appropriate here and Sternberg's and Venable's disqualification is automatic.

D. Even if Loop AI is Treated as a Former Client, Disqualification is Warranted

As explained above and in Loop AI's DQ Motion, this is not a typical "former client conflict" scenario – like the one in *Adams v. Aerojet* – where the conflict at issue did not begin *until long after* (almost 10 years after) the challenged lawyer had left his former firm.²² But

²¹ Moreover, the evidence to which Loop AI points in its DQ Motion is undisputed: Almaxwave and Venable vigorously tried to conceal Sternberg's involvement in this case, including by directing Orrick to object to the identification of the Orrick attorneys who had worked on the Almaxwave-Gatti representation. *See* DQ Motion. at 1, n. 7. If Almaxwave or its counsel had no concerns about the consequences of Sternberg's conflict, there would have been no reason to conceal from Loop AI Sternberg's role while he was at Orrick, or his participation in this case, let alone vigorously file objections to impede or delay the disclosure of his identity. Indeed, it is quite unusual for the senior partner in charge of a litigation, and who describes himself on Venable's website as being "actively engaged in multijurisdictional disputes, including ... litigation, ... trade secrets misappropriation, [and] employment ... matters," to not file a formal appearance in the matter he is in charge of and remain instead in the background. *See* Venable's Biography for Peter R. Sternberg, <https://www.venable.com/peter-r-sternberg/> (last accessed October 27, 2015).

²² *See Adams v. Aerojet-General Corp.*, 86 Cal. App. 4th 1324 (2001). The *Adams* court decided that when a lawyer who spent no time rendering services for a client and who had no contact with a client or its executives or the team working for the client while at a firm went to another firm and, "years later", undertook to act adversely to the former client, his new firm would not be "automatically disqualified." In that case challenged counsel's first firm had represented Aerojet in the mid-1980's and the challenged attorney left the firm in **1989** – it was not until **1998** that he began acting adversely to Aerojet's interests. *Id.* at 1329.

1 even under the former client conflict rule that is applied in that far more common situation,
 2 Sternberg's disqualification would still be warranted here.

3 According to Almaxwave, Loop AI failed "to submit any evidence that Sternberg actually
 4 obtained Loop's material confidential information." Opp. 10:1:2. But, as Almaxwave well knows
 5 from having read the *Adams* case it repeatedly cites, this is not the test "[d]isqualification of an
 6 attorney from undertaking representation adverse to a former client does not require proof that
 7 the attorney *actually* possesses confidential information. Rather, in applying rule 3-310(E)"
 8 California courts "have utilized the 'substantial relationship' test." *Adams*, 86 Cal. App. 4th at
 9 1331.
 10

11 Moreover, in this case, Almaxwave and its counsel ensured that Loop AI would not have
 12 access to the evidence Almaxwave now claims is missing. See VCH Decl. at ¶¶ 9. Almaxwave not
 13 only objected to all discovery (including document and deposition discovery) from Orrick,
 14 Venable, Sternberg, Gatti, and each of the Almaxwave Defendants, it also objected to (and
 15 directed other nonparties to object to) providing basic privilege logs, even though both –
 16 discovery and privilege logs — are plainly required under the Federal Rules. In light of
 17 Almaxwave's, Sternberg's and Venable's objections, including those made in respect of
 18 documents possessed by Orrick, Almaxwave's self-serving declarations cannot be taken as
 19 evidence of anything and should be disregarded in their entirety.²³ Clearly, if Almaxwave,
 20 Sternberg, and Venable had nothing to hide, there was no reason to oppose all forms of discovery
 21 over everything.
 22
 23

24 ²³ See, e.g., *Elan Transdermal, Ltd. v. Cygnus Therapeutic Sys.*, 809 F. Supp. 1383, 1390 (N.D.
 25 Cal. 1992) (WHO) (disqualification granted) ("to allow this presumption to be rebutted by
 26 declarations by self-interested parties, the rebuttal evidence that would inevitably be put forward
 27 in every case of this sort, would raise a strong sense of impropriety."); *id.* at 1392-1393 ("The
 28 Court, reading the stack of declarations from Irell attorneys, all proclaiming their ignorance of
 Cygnus-related matters, is reminded of the words of Hamlet's mother: 'The lady doth protest too
 much, methinks.' William Shakespeare, *Hamlet*, act 3, sc. 2.").

Almawave is also wrong about who bears the ultimate burden of proof on this motion. Almawave says that Loop AI, as the moving party, “carries a heavy burden and must satisfy a high standard of proof.” Opp. 4:4-5. But Loop AI’s burden is, at most, to show that Orrick’s representation of Loop AI and Sternberg’s representation adverse to Loop AI are substantially related, which Loop AI has already done in its DQ Motion. *See* Mot. at 18:20-21:6. As the *Adams* court made clear, “in light of the paramount importance of maintaining the inviolability of client confidences, where a substantial relationship between the former firm’s representation of the client and the current lawsuit has been shown (as is the case here), *the attorney whose disqualification is sought should carry the burden of proving that he had no exposure to confidential information relevant to the current action while he was a member of the former firm.*”²⁴ *Id.* at 1341 (emphasis supplied). The court went on to emphasize that this “burden requires an affirmative showing and is not satisfied by a cursory denial.” *Id.*

Even if the Court were to consider Sternberg’s declaration, he simply denies, in cursory fashion, that he ever met Gatti, but does not rule out the possibility that he may have spoken to her over the telephone – he only says that he does not “recall” doing so. *See* Dkt. 278-2 at ¶ 10. Moreover, in prior briefs and declarations submitted by both Valeria Sandei and Thomas Wallerstein, Almawave represented that Gatti was communicating with the Orrick team. *See, e.g.,* Dkt. 168 at passim, VCH Decl., Ex. 5; Dkt. 168-1 at ¶ 5, 168-2. Sternberg’s conclusory denials of contact with Gatti or with the Orrick lawyers working for Loop AI — three of which overlapped — are not the “affirmative showing” that he had no access to Loop AI’s confidences that the applicable cases have in mind. *See, e.g., United States v. Sun Keung Lee*, No. CR 10-0186 MHP, 2011 U.S. Dist. LEXIS 1198, at *7 (N.D. Cal. Jan. 5, 2011) (“Whether Mr. Gruel

²⁴ The *Adams* court also explained, in deciding a disqualification motion, “[t]he trial court’s discretion is broad. It may not only consider the declarations and other evidence before it, but may apply ‘inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together...’” *Id.* at 1340, quoting ABA Model Rule 1.9, com. [6].

has any present recollection is not dispositive here”), citing *Rosenfeld Constr. Co. v. Super. Ct.*, 235 Cal. App. 3d 566, 576 (1991) (“We find no authority that supports the notion that, standing alone, the present recollection of the members of the firm is an adequate criterion.”) and *Global Van Lines, Inc. v. Super. Ct.*, 144 Cal.App.3d 483, 488 (1983) (finding that, notwithstanding an attorney’s claims of no present recollection, it is not unreasonable to impute receipt of confidential information where it would have been logical for the attorney to have received such information in the course of his employment).

In light of the above, as well as the California Supreme Court’s admonition that the “important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process” – Loop AI respectfully submits that the Court should resolve any doubt it may have as to whether Sternberg received Loop AI confidences while at Orrick in favor of a finding that he did.

III. THE PERSONAL INTEREST CONFLICT CREATED BY STERNBERG IS AN INDEPENDENT REASON FOR HIS AND VENABLE’S DISQUALIFICATION.

In its DQ Motion Loop AI argued that Sternberg’s and Venable’s disqualification in this case is also required as a result of a personal interest conflict arising out of Sternberg’s material participation in the events giving rise to this case. Loop AI explained that, as a result of his involvement in the underlying events at issue in this action, Sternberg is exposed to liability from multiple parties. Mot. at 21-24. Loop AI provided precedential authority from both New York and California that supports disqualification based on an attorney’s personal conflict of interest.²⁵ Almawave does not dispute in its brief that Sternberg faces liability to Loop AI, Almawave and possibly others (e.g., Orrick) as a result of the events at issue.²⁶ Nor does Almawave provide any

²⁵ See Mot. at 23 and n. 53. The Rules of Professional Conduct and the case law recognize conflicts arising out of a lawyer’s personal interest in the case. See, e.g., NY Rules of Prof’l Con. R. 1.7(a)(2) (conflict exists whenever “there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own ... personal interests.”). See also, e.g., *Cal Pak Delivery, Inc. v. UPS, Inc.*, 52 Cal. App. 4th 1, 11 (1997) (disqualifying counsel based on personal interest conflict).

²⁶ Almawave also does not disclose in its brief or declarations whether it has already threatened Sternberg with any claims.

1 case law to the contrary. Instead, Almawave ignores the points made by Loop AI and falsely re-
 2 characterizes Loop AI's position as based on a contention that under the attorney-witness rule
 3 disqualification is not appropriate. Although there is no question that Sternberg will be a
 4 material witness in this case, Loop AI is not invoking the attorney-witness rule.

5 Loop AI demonstrated in its DQ Motion that, in this litigation, such a personal interest
 6 conflict is likely to impede the administration of justice and is improper. Venable has been
 7 advocating positions on behalf of Almawave that it should have reason to know are incorrect and
 8 that a law firm without a personal interest would be unlikely to take. For instance, the most
 9 recent example of this behavior is Venable's insistence that Almawave USA is a real, substantial,
 10 stand-alone enterprise — at a time when Almawave USA's *only business address has been*
 11 *changed from Gatti's home to Venable's modest-sized San Francisco office*²⁷ (facts inevitably
 12 known to Venable that appear to directly refute the position taken, and reflecting an unusual
 13 entanglement of Venable in its client's business while that business is specifically at issue in this
 14 case).²⁸

15 Almawave claims that Loop AI added allegations in its Second Amended Complaint
 16 regarding Sternberg for purposes of the supporting its DQ Motion, but this claim lacks any basis
 17 in fact. The personal interest conflicts afflicting Sternberg and Venable were created by them,
 18 not by Loop AI.²⁹ These conflicts provide an independent basis for ordering Sternberg and
 19 Venable's disqualification.³⁰

20 ²⁷ See, e.g., Dkt. 252-1; VCH Decl., Ex. 3.

21 ²⁸ A firm's sharing of office space with a client has been recognized as creating disqualifying
 22 conflicts in other contexts. See, e.g., *Apple Computer, Inc. v. Sup. Ct.*, 126 Cal. App. 4th 1253,
 1266 (Cal. App. 2d Dist. 2005) (disqualifying counsel based on appearance of impropriety).

23 ²⁹ As the Court is aware, Loop AI brought its claim based on Orrick's fiduciary breaches *in April*
 24 **2015**. See Dkt. 45 at ¶ 308. On July 2, 2015, the Court even heard oral argument on that claim.
 25 See Dkt. 159 at 20-22. During that hearing, Loop AI's counsel — before knowing that Sternberg
 26 was the lawyer personally responsible for the Orrick breaches at issue here — explained to the
 27 Court why Orrick breached its fiduciary duties to Loop AI by undertaking the conflicted
 28 Almawave-Gatti representation. *Id.* Loop AI could not have included Sternberg's name in the
 Complaint sooner because Almawave and Venable concealed his name and vigorously objected
 to Orrick's disclosure of that information, which was only provided as a result of Judge Ryu's
 Order regarding the Orrick Subpoena.

³⁰ *Chugach Electric Asso. v. US*, 370 F.2d 441, 442 (9th Cir. 1966) ("Where conflict of interest
 or abuse of professional confidence is asserted, the right of an attorney freely to practice his
 profession must, in the public interest, give way in cases of doubt.")

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Respectfully submitted,

By: /s/ Valeria Calafiore Healy

Valeria Calafiore Healy, Esq. (*phv*)
Valeria.healy@healylex.com
HEALY LLC
154 Grand Street
New York, New York 10013
Telephone: (212) 810-0377
Facsimile: (212) 810-7036

Daniel J. Weinberg, Esq. (SBN 227159)
dweinberg@fawlaw.com
FREITAS ANGELL & WEINBERG
LLP
350 Marine Parkway, Suite 200
Redwood Shores, California 94065
Telephone: (650) 593-6300
Facsimile: (650) 593-6301

Attorneys for Plaintiff
LOOP AI LABS, INC.